RECORD
AND
BRIEFS

No. 16-1161

IN THE
Supreme Court of the United States

BEVERLY R. GILL, ET AL.,

Appellants,

v.

WILLIAM WHITFORD, ET AL.,

Appellees.

On Appeal From The United States District Court For The Western District Of Wisconsin

BRIEF OF THE WISCONSIN INSTITUTE FOR LAW AND LIBERTY AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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INTEREST OF *AMICUS CURIAE*[1]

The Wisconsin Institute for Law and Liberty ("WILL") is a nonprofit organization that supports and promotes the public interest in the rule of law, individual liberty, constitutional government, and a robust civil society.

WILL is an active participant in issues of public concern to the State of Wisconsin. WILL has represented plaintiffs in election law and free speech cases. Among other matters, it successfully challenged Wisconsin laws limiting aggregate campaign contributions and donations from political committees. It also obtained a favorable settlement in a challenge to a local sign ordinance. In addition, WILL's president and general counsel testified at a joint public hearing on redistricting before the Wisconsin Legislature in 2011. WILL strives to advance the debate concerning law and public policy in these and other areas.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution to fund the preparation or submission of this brief. A contribution to fund the submission of this brief was made by the Freedom Partners Institute. Pursuant to Supreme Court Rule 37.2, counsel for *amicus curiae* states that counsel for appellants and appellees received timely notice of intent to file this brief. Appellants have entered consent to the filing of *amicus curiae* briefs on the docket; appellees have consented in writing to the filing of this brief.

SUMMARY OF ARGUMENT

"[L]egislative reapportionment is primarily a matter for legislative consideration and determination," *Reynolds* v. *Sims*, 377 U.S. 533, 586 (1964), because "federalism and the slim judicial competence to draw district lines weigh heavily against judicial intervention in apportionment decisions," *Miller* v. *Johnson*, 515 U.S. 900, 934–35 (1995) (Ginsburg, J., dissenting).

Federal courts "lac[k] the authority to decide" disputes that raise political questions. *Zivotofsky* v. *Clinton*, 566 U.S. 189, 195 (2012). A dispute asks a political question when there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Id.*

In Wisconsin, federal courts have played a heavy hand in the redistricting process since the 1980s, imposing court-ordered plans in 1982, 1992, and 2002. *See* App. 9a–11a. The district court in this case struck down Wisconsin's legislatively enacted redistricting plan without articulating a manageable standard for deciding claims of political gerrymandering. It found no departure from traditional redistricting principles, but nevertheless invalidated the plan because the election results were insufficiently proportional to the aggregated votes for Republican and Democratic candidates statewide—an election that Wisconsin does not hold.

As this case, and others like it, demonstrate, there is no settled, workable standard by which to decide how much disproportionality is too much. Therefore, federal courts have no jurisdiction. This Court should remove any lingering uncertainty by noting probable

jurisdiction and holding that "political gerrymandering claims are nonjusticiable." *Vieth* v. *Jubelirer*, 541 U.S. 267, 281 (2004) (plurality opinion).

Even if this Court decides that a judicially manageable standard can be devised for political gerrymandering claims, it should reverse the district court because apportionment plans that adhere to traditional redistricting criteria are constitutionally permitted. The opinions in *Vieth* reflect a consensus that such districts cannot be challenged. *See, e.g.*, *Vieth*, 541 U.S. at 306 (plurality opinion); *id.* at 307 (Kennedy, J., concurring in the judgment); *id.* at 318 (Stevens, J., dissenting); *id.* at 347 (Souter, J., dissenting). To affirm the district court on this issue "would commit federal and state courts to unprecedented intervention in the American political process," *id.* at 306 (Kennedy, J., concurring in the judgment), and require those courts to draw district lines for everything from Congress to the State Senate to the local school board. *See, e.g.*, Wis. Const. art. IV, § 3 (providing for political apportionment of State Senate districts); Wis. Stat. Ann. § 120.02(2) (providing for political apportionment of school boards). This would be both unwise and unworkable.

ARGUMENT

This case provides an opportunity for this Court to address a confusing area of law that has harmed the political institutions of the States and left district courts struggling to answer "unsolvable" questions, *Radogno* v. *Ill. State Bd. of Elections*, No. 11-4884, 2011 WL 5868225, at *2 (N.D. Ill. Nov. 22, 2011) (*Radogno II*), by employing "unknowable" standards, *Ala. Legislative Black Caucus* v. *Alabama*, 988 F. Supp. 2d 1285, 1296 (M.D. Ala. 2013) (*ALBC I*).

The limit on the judicial power imposed by the political question doctrine is jurisdictional—the court has no power to render judgment in a dispute if there is no standard. *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974) ("The concept of justiciability expresses the jurisdictional limitations imposed upon federal courts by the 'case or controversy' requirement of Article III."). The political question doctrine does not prevent courts from asserting jurisdiction merely "because the issues have political implications," *INS* v. *Chadha*, 462 U.S. 919, 943 (1983), but it does prevent a court from usurping the prerogatives of the political branches when the constitutional basis for the claim "lacks sufficient precision to afford any judicially manageable standard of review." *Nixon* v. *United States*, 506 U.S. 224, 230 (1993); *see also, e.g.*, *Ariz. State Legislature* v. *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2660 n.3 (2015) (sovereign right of the people to "reserv[e] for themselves the power to adopt laws and to veto measures passed by elected representatives" presents a nonjusticiable political question); *Jones* v. *United States*, 137 U.S. 202, 216–17 (1890) (courts have no means of reviewing executive's determination of sovereignty over a territory).

Appellees grounded their arguments below on the First Amendment and the Equal Protection Clause. Neither provides a clear or appropriate standard to judge their claims. Appellees' First Amendment claim is unworkable because it would subject all apportionment plans to strict scrutiny as restrictions on core political speech or associational interests, *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995), which then would preclude all political considerations. That is hard to square with the

position of a majority of this Court that "'politics as usual' is . . . *itself* a 'traditional' redistricting criterion." *Cox* v. *Larios*, 542 U.S. 947, 952 (2004) (Scalia, J., dissenting) (citing *Vieth*, 541 U.S. at 285 (plurality opinion); *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment); *id.* at 344 (Souter, J., dissenting); *id.* at 355 (Breyer, J., dissenting)).

An Equal Protection Clause claim similarly provides no workable standard because partisanship is neither an immutable characteristic nor a protected classification. *See City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (classifications by race, alienage or national origin are subject to strict scrutiny). Nothing in the Equal Protection Clause requires state governments to act in a way that minimizes the political consequences of the geographic concentration of voters by party.

After more than fifty years of wrangling with these challenges, this Court should acknowledge that there is no determinable legal standard by which a court can consistently and impartially determine whether partisan reapportionment goes "too far." These cases are nonjusticiable.

I. PARTISAN GERRYMANDERING CLAIMS ARE NOT JUSTICIABLE

After this Court entered the redistricting fray in *Baker* v. *Carr*, 369 U.S. 186 (1962), district courts have come to anticipate apportionment litigation "[l]ike a periodic comet, once every ten years." *Radogno* v. *Ill. State Bd. of Elections*, No. 11-4884, 2011 WL 5025251, at *1 (N.D. Ill. Oct. 21, 2011) (*Radogno I*). When plaintiffs allege a political gerrymander, courts struggle to make sense of the claim.

A. This Court's Attempts To Wrestle With Political Gerrymandering Claims Provide Conflicting Precedents And Inadequate Guidance To District Courts

This Court first held that apportionment plans were susceptible to constitutional challenges in *Baker* v. *Carr*. 369 U.S. at 187. The Court also held that apportionment plans must distribute the population in roughly equivalent districts, *Reynolds* v. *Sims*, 377 U.S. 533, 568 (1964); *Wesberry* v. *Sanders*, 376 U.S. 1, 7–8 (1964), and cannot divide racial groups to "depriv[e members of one race] of the municipal franchise," *Gomillion* v. *Lightfoot*, 364 U.S. 339, 347 (1960).

Soon this Court was called on to decide whether the Constitution permitted politically motivated apportionment plans. Its early decisions were inconsistent. *Compare WMCA, Inc.* v. *Lomenzo*, 382 U.S. 4 (1965), *summarily aff'g* 238 F. Supp. 916 (S.D.N.Y. 1965) (political apportionment claim is not justiciable); *Jimenez* v. *Hidalgo Cty. Water Improvement Dist. No. 2*, 424 U.S. 950 (1976), *summarily aff'g* 68 F.R.D. 668 (S.D. Tex. 1975) (same); *Ferrell* v. *Hall*, 406 U.S. 939 (1972), *summarily aff'g* 339 F. Supp. 73 (W.D. Okla. 1972) (same); *Wells* v. *Rockefeller*, 398 U.S. 901 (1970), *summarily aff'g* 311 F. Supp. 48 (S.D.N.Y. 1970) (same), *with Fortson* v. *Dorsey*, 379 U.S. 433, 439 (1965) (plans that "minimize or cancel out the voting strength of racial or political elements of the voting population" are invalid); *Burns* v. *Richardson*, 384 U.S. 73, 88 (1966) (quoting *Fortson*); *Whitcomb* v. *Chavis*, 403 U.S. 124, 143 (1971) (same); *and Gaffney* v. *Cummings*, 412 U.S. 735, 751 (1973) (adjudicating claim of political apportionment without assessing justiciability).

After years of conflicting decisions, a fractured majority of this Court held that assertions of partisan apportionment presented a justiciable question in *Davis* v. *Bandemer*, 478 U.S. 109 (1986), but neither the *Bandemer* Court nor any subsequent Court has been able to agree on a standard for such cases.

Bandemer's plurality opinion suggested a two-part test, with plaintiffs "required to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." 478 U.S. at 127 (White, J., concurring). For the plurality, that an apportionment plan emerged from a political process was almost *per se* proof of discriminatory intent. *Id.* The plurality's proposed test for discriminatory effect was more demanding than its intent test but less precise—the "mere lack of proportional representation" was not sufficient; rather, plaintiffs had to show that the plan "consistently degrade[d] a voter's or a group of voters' influence on the political process as a whole." *Id.* at 131–32. Justice Powell proposed an alternative standard that considered "a number of other relevant neutral factors," including "the configuration of the districts, the observance of political subdivision lines, and other criteria that have independent relevance to the fairness of districting"—in short, traditional redistricting criteria. *Id.* at 161–62, 165 (Powell, J., concurring in part and dissenting in part).

Bandemer proved difficult in application. *Vieth* v. *Jubelirer*, 541 U.S. 267, 283 (2004) (cataloging confusion in both courts and scholarship caused by *Bandemer*).

This Court once again considered justiciability in *Vieth*. The Court explicitly retreated from *Bandemer*, and a majority of the Justices agreed that partisan

gerrymandering claims could be considered only rarely, if at all. A plurality concluded "that political gerrymandering claims are nonjusticiable and that *Bandemer* was wrongly decided." *Id.* at 281. The concurrence "would not foreclose all possibility of judicial relief" but agreed that, after nearly twenty years, no manageable standard had been identified, which "make[s] our intervention improper." *Id.* at 306, 317 (Kennedy, J., concurring in the judgment). The four dissenting Justices authored three opinions, each proposing a different standard, none of which replicated the *Bandemer* plurality's test.

Two years after *Vieth*, this Court returned to the question of political apportionment and once again failed to provide any standard. *League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399 (2006) (*LULAC*). The Court observed that "disagreement persists" regarding the justiciability of political gerrymandering claims but declined to revisit *Vieth*. *LULAC*, 548 U.S. at 414. None of the Court's six opinions garnered a majority. Nevertheless, a majority of the Court agreed that the plaintiffs had not identified constitutionally flawed partisanship in the mid-decade redistricting plan even though "[t]he legislature [did] seem to have decided to redistrict with the sole purpose of achieving a Republican congressional majority." *Id.* at 417; *see id.* at 423 (plurality opinion); *id.* at 483 (Souter, J., concurring in part); *id.* at 511 (Scalia, J., concurring in the judgment in part).

B. The Thirteen Years Of Confusion Following This Court's Decision In *Vieth v. Jubelirer* Demonstrate That No Manageable Standard Will Emerge

Bandemer's legacy proved to be "one long record of puzzlement and consternation." *Vieth*, 541 U.S. at 282; *see also id.* at 283. While the plurality in *Vieth* took this puzzlement as proof that these cases have no workable standard, the concurrence argued that district courts between *Bandemer* and *Vieth* were bound to "do no more than follow" the "single, apparently insuperable standard" described by the *Bandemer* plurality. *Id.* at 312 (Kennedy, J., concurring in the judgment). The concurrence suggested that district courts might be more successful devising a standard once freed from *Bandemer*. *Id.* They have not been. Instead, they struggle to apply caselaw that is "foggy at best," and consists mainly of "cobbled-together plurality opinions that place district courts in the untenable position of evaluating political gerrymandering claims without any definitive standards." *Radogno I*, 2011 WL 5025251, at *4.

When last this Court considered the justiciability of partisan gerrymandering, the *Vieth* plurality concluded that "[e]ighteen years of essentially pointless litigation have persuaded us that *Bandemer* is incapable of principled application." *Vieth*, 541 U.S. at 306. "[E]ssentially pointless litigation" has now continued for thirteen more years. The nine opinions in *Vieth* and *Bandemer* could not identify a rule of decision with support from a majority of the Justices. Nor did any standard obtain a majority across the six opinions authored in *LULAC*.

The predictable outcome is confusion and disquiet in the lower courts. *See, e.g.*, *Shapiro* v. *McManus*, 203 F. Supp. 3d 579, 594 (D. Md. 2016) ("while political gerrymandering claims premised on the Equal Protection Clause remain justiciable in theory, it is presently unclear whether an adequate standard to assess such claims will emerge"); *Raleigh Wake Citizens Ass'n* v. *Wake Cty. Bd. of Elections*, 166 F. Supp. 3d 553, 591 n.15 (E.D.N.C.) (observing the "extraordinary tension" among this Court's partisan gerrymandering decisions), *aff'd in part*, 827 F.3d 333, 348 (4th Cir. 2016) ("the Supreme Court has not yet clarified when exactly partisan considerations cross the line from legitimate to unlawful"); *ALBC I*, 988 F. Supp. 2d at 1296 ("the standard for adjudication of [plaintiffs'] claim of partisan gerrymandering is 'unknowable'"); *Radogno II*, 2011 WL 5868225, at *2 ("political gerrymandering claims . . . are currently 'unsolvable' based on the absence of any workable standard for addressing them"); *Perez* v. *Texas*, No. 11-360, 2011 WL 9160142, at *11 (W.D. Tex. Sept. 2, 2011) (dismissing political gerrymandering claims due to absence of "a reliable standard by which to measure the redistricting plan's alleged burden on . . . representational rights").

In short, the Supreme Court has left lower courts "ask[ing] . . . how we could 'allow a claim to go forward that no one understands?'" *ALBC I*, 988 F. Supp. 2d at 1296. Predictably, "the results from one gerrymandering case to the next" have proven "disparate and inconsistent." *Vieth*, 541 U.S. at 308 (Kennedy, J., concurring in the judgment).

The "efficiency gap" metric proposed by the appellees here is no solution. It is neither novel nor rooted in any constitutional right. This measure is

merely a dressed-up form of proportionality analysis, and even the *Bandemer* plurality agreed that "the mere lack of proportional representation will not be sufficient to prove unconstitutional discrimination." *Bandemer*, 478 U.S. at 132; *see also LULAC*, 548 U.S. at 419–20 (Kennedy, J., concurring in the judgment) ("there is no constitutional requirement of proportional representation, and equating a party's statewide share of the vote with its portion of the congressional delegation is a rough measure at best").

Furthermore, the "efficiency gap" identified by the district court is attributable not to nefarious political gerrymandering but to changing political geography. Parties suffer large numbers of "wasted" votes because like-minded voters increasingly live in close proximity to each other. App. 307a–11a (discussing Wisconsin's political geography); *see also* Michael Barone, *Straight-Ticket Voting in Divided Government*, *in* THE ALMANAC OF AMERICAN POLITICS 2016, at 19 (Richard E. Cohen & James A. Barnes eds., 2015) (Electoral outcomes are "largely the result of demographic clustering, the fact that heavily Democratic voting groups—blacks, Hispanics (in many states) and gentry liberals—tend to be clustered in most central cities, many sympathetic suburbs and most university towns, while Republican voters are spread more evenly around the rest of the country. . . . [C]lustering helps Republicans in elections held in equal-population districts, since Democratic votes are clustered in relatively few districts and Republican votes are more evenly spread around in the rest."); Bill Bishop, THE BIG SORT (2009); Jesse Sussell & James A. Thomson, ARE CHANGING CONSTITUENCIES DRIVING RISING POLARIZATION IN THE U.S. HOUSE OF REPRESENTATIVES?, at 5–8 (Rand 2015).

Nationwide, in the 2016 election, 61% of voters cast ballots in counties that went at least 60-40 to one presidential candidate, up from 50% of voters living in such counties in 2012 and 39% of voters in 1992. David Wasserman, *Purple America Has All But Disappeared*, FIVETHIRTYEIGHT (Mar. 8, 2017), https://fivethirtyeight.com/features/purple-america-has-all-but-disappeared/. In 2016, only 303 of America's 3,113 counties were decided by a single-digit margin, while in 1992, 1,096 counties were decided by single-digit margins. *Id.* Over the same period, the number of counties decided by margins greater than 50 percentage points increased from 96 to 1,196. *Id.* Minimizing the "efficiency gap" in this rapidly changing political landscape would require legislatures to draw tortured districts in a fruitless, open-ended quest for some notion of competitiveness. Nor is there any neutral way for courts to superintend such a process or to impartially redraw districts after invalidating a politically drafted plan.

Advancing technology, far from assisting reviewing courts, merely increases the challenge of identifying a standard. Legislatures (and litigants) are now able to draw an infinite variety of potential maps with a few keystrokes, each marginally different in its balancing of the traditional voting criteria. District courts are not authorized or equipped to draw sharp lines separating the constitutionally permissible from the impermissible among an infinite variety of computer-generated plans.

C. Repeated Litigation Over Redistricting Damages The Political Process And The Courts

Judicial micromanagement of the redistricting process destabilizes the political branches. The

district court's "efficiency gap" test boils down to a proportionality requirement that would undermine single-member districts. App. 276a–79a. If legislative representation must match statewide voter preferences, courts will eventually require a proportional representation system (particularly as minor-party or special-interest plaintiffs bring claims). *See Joint Public Hearing on Wisconsin Redistricting Plan Before the Wisconsin Legislature*, 100th Leg., Extraordinary Sess. 61 (Wis. 2011) (statement of Professor Richard Esenberg). That system will diminish electoral accountability and increase legislative gridlock as shifting coalitions transition in and out of power. *See Vieth*, 541 U.S. at 357–58 (Breyer, J., dissenting).

There is no need for this. Citizens can use the political process to restrain partisan apportionment. *Vieth*, 541 U.S. at 362–63 (Breyer, J., dissenting); *see also Ariz. State Legislature* v. *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2663 (2015) (upholding redistricting commission adopted through initiative process); Cal. Const. art. XXI, §§ 1–3 (establishing redistricting commission); Alaska Const. art. VI, § 8 (same); Wash. Const. art. II, § 43 (same); Idaho Code Ann. §§ 72-1501 *et seq.* (same). Even in States where the political branches conduct apportionment, state law and electoral accountability provide a check on partisan gerrymanders. At the federal level, Congress has the authority to police apportionment of congressional districts. U.S. Const. art. I, § 4; *see also* 2 U.S.C. § 2c; Apportionment Act of 1842, 5 Stat. 491; Apportionment Act of 1872, 17 Stat. 28. And there are five bills currently pending in Congress that propose to regulate apportionment. H.R. 1102, H.R. 711, H.R. 713, H.R. 151, H.R. 145, 115th Cong., 1st Sess. (2017).

Political apportionment challenges also impose serious burdens on judicial resources. Redistricting litigation bursts into the federal courts at the conclusion of each Census cycle. *Radogno I*, 2011 WL 5025251, at *1. Mid-cycle redistricting generates further litigation. *LULAC*, 548 U.S. at 409–10. Nor is litigation limited to only a handful of States—apportionment lawsuits are filed across the nation. Because these lawsuits are heard by three-judge district courts and require exhaustive judicial fact-finding, they impose unusually high demands on judges. *See, e.g.*, *Ala. Legislative Black Caucus* v. *Alabama*, No. 2:12-cv-691, 2017 WL 378674 (M.D. Ala. Jan. 20, 2017) (457-page slip opinion); App. 1a–315a (116-page slip opinion).[2] Apportionment challenges drag on for years, often reaching resolution only as the next Census approaches.

A fractured result, as in *Bandemer* and *Vieth*, affirming the decision below would put district courts in "litigation limbo," condemning them to "many more years wrestling with [these cases] all without a wisp of an idea what rule of law might govern [their] disposition." *Kerr* v. *Hickenlooper*, 759 F.3d 1186, 1195 (10th Cir. 2014) (Gorsuch, J., dissenting from

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[2] The *Vieth* plurality identified a perfect example of the futile burdens these cases place on district courts. A North Carolina district court considered 311 stipulations, 132 witness statements, and 300 exhibits, and heard two days of oral argument, before concluding that the State's system of statewide election of superior court judges "resulted in Republican candidates experiencing a consistent and pervasive lack of success and exclusion from the electoral process as a whole" and that "these effects were likely to continue unabated into the future." *Republican Party of N.C.* v. *Hunt*, No. 94-2410, 1996 WL 60439, at *1 (4th Cir. Feb. 12, 1996). Five days after the district court's ruling, every Republican candidate running for superior court under that same electoral system prevailed. *Vieth*, 541 U.S. at 287 n.8. The circuit court remanded for reconsideration. *Id.*

denial of reh'g en banc). Recognizing that these questions are nonjusticiable would acknowledge the reality of redistricting and relieve the courts and the political branches of these harms.

D. Holding Partisan Gerrymandering Claims Nonjusticiable Reaffirms The Outcome Of *Vieth* And Would Not Implicate *Stare Decisis* Concerns

In *Vieth*, the entire Court declined to follow the plurality's standard in *Bandemer*. A plurality of four Justices concluded "that *Bandemer* was wrongly decided," *Vieth*, 541 U.S. at 281, while another Justice joined the judgment, noting "the shortcomings" of *Bandemer* and observing that the Court's inability to describe a standard "make[s] our intervention improper," *see id.*, at 308, 316 (Kennedy, J., concurring in the judgment).

To the extent that *Vieth* arguably left open the slender possibility that partisan gerrymandering cases may be justiciable, the doctrine of *stare decisis* is no barrier to this Court's holding that they are nonjusticiable. "Beyond workability, the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." *Montejo* v. *Louisiana*, 556 U.S. 778, 792–93 (2009). This Court also considers whether "experience has pointed up the precedent's shortcomings." *Pearson* v. *Callahan*, 555 U.S. 223, 233 (2009).

None of these factors counsels in favor of the justiciability of partisan gerrymandering claims, for substantially the same reasons that the Court abrogated *Bandemer* in *Vieth*. First, there is no workable test to disturb. *See supra* § I.B. This Court

has not hesitated to overturn fractured decisions that "creat[e] confusion among the lower courts," *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 64 (1996), or that contain no test at all, *see Vieth*, 541 U.S. at 305–06 (plurality opinion) (noting "the majority's inability to enunciate the judicially discernible and manageable standard that it thought existed"). Second, the decision in *Vieth* is only thirteen years old, which is younger than other decisions that this Court has overturned. *See, e.g.*, *Montejo*, 556 U.S. at 793 (overturning a decision that was "only two decades old"). Third, the reliance interests are "weak because it is hard to imagine how any action taken in reliance upon [the decision] could conceivably be frustrated—except the bringing of lawsuits, which is not the sort of primary conduct that is relevant." *Vieth*, 541 U.S. at 306 (plurality opinion). Fourth, the fractured nature of the decision means that there is no concern with overturning a well-reasoned opinion. *Cf. Seminole Tribe*, 517 U.S. at 66 (calling a decision "of questionable precedential value, largely because a majority of this Court expressly disagreed with the rationale of the plurality"). And, fifth, thirteen years of confusion in the district courts have "pointed up the precedent's shortcomings." *Pearson*, 555 U.S. at 233; *see supra* § I.B.

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Consequently, the Court should note probable jurisdiction and provide authoritative guidance to district courts by holding that assertions of partisan gerrymandering present a nonjusticiable question.

II. A PLAN THAT COMPLIES WITH TRADITIONAL REDISTRICTING CRITERIA IS NOT AN UNCONSTITUTIONAL POLITICAL GERRYMANDER

Another question raised by this case is whether a district can be a political gerrymander when it complies with traditional, politically neutral redistricting criteria. For example, the majority party in the legislature might draw a district that it hopes will favor its constituency in the next election, but the map also might contain compact, contiguous districts that respect political subdivisions and communities of interest. *See* Wis. Const. art. IV, § 4 ("such districts [are] to be bounded by county, precinct, town or ward lines, to consist of contiguous territory and be in as compact form as practicable").

Even if a claim of political gerrymandering is justiciable, this Court should note probable jurisdiction and hold that a district that complies with traditional redistricting criteria is not an unconstitutional partisan gerrymander. The district court reached the opposite conclusion, holding that an unconstitutional gerrymander occurred even though, as the dissent observed, "the plaintiffs did not argue that Act 43 created any districts with unusual shapes or lines" and did not show any "appreciable problems with contiguity, compactness, or regard for political boundaries." App. 250a–51a. The district court's reasoning ignores the consensus on this issue in *Vieth* and the logic of this Court's other gerrymandering cases.

As the dissent noted below, all but one of the opinions in *Vieth* adopted the commonsense position that a district that complies with traditional redistricting criteria is not an unconstitutional political gerrymander. True, the plurality rejected the

workability of the subordination test as a means of deciding whether a district is a political gerrymander. *See Vieth*, 541 U.S. at 284–90. But the plurality would not have allowed any challenges to districts as political gerrymanders, which means that they would not strike down a district that complied with traditional redistricting criteria.

Three of the four dissenters—who agreed on little—made clear that they would uphold districts that complied with traditional redistricting criteria. Justice Stevens would have held a district unconstitutional "when any pretense of neutrality is forsaken unabashedly and all traditional districting criteria are subverted for partisan advantage." *Vieth*, 541 U.S. at 318 (Stevens, J., dissenting); *see also id.* at 335 ("We have explained that 'traditional principles[]' . . . 'may serve to defeat a claim that a district has been gerrymandered on racial lines.'" (quoting *Shaw* v. *Reno*, 509 U.S. 630, 647 (1993))); *id.* at 339 ("[I]f no neutral criterion can be identified to justify the lines drawn . . . then no rational basis exists to save the district from an equal protection challenge."). Justice Souter, joined by Justice Ginsburg, proposed a five-part prima facie case that a plaintiff must make, including that "the district of his residence paid little or no heed to . . . traditional districting principles." *Id.* at 347–48 (Souter, J., dissenting) (citation omitted); *see also id.* at 349 (requiring the plaintiffs to "establish specific correlations between the district's deviations from traditional districting principles and the distribution of the population" and to "present the court with a hypothetical district" that "deviated less from traditional districting principles than the actual district").

Justice Kennedy's concurring opinion also leads to the conclusion that a district that complies with traditional redistricting criteria is constitutional. He stated that "[a] determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied. It must rest instead on a conclusion that the classifications, though generally permissible, were applied in an invidious manner or in a way unrelated to any legitimate legislative objective." *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment). Under this test, a district that complies with traditional redistricting criteria would pass muster because it would be "[r]elated to [] legitimate legislative objective[s]." Even though the Court agreed on little in *Vieth*, all but one Justice explicitly stated that a district is not an unconstitutional partisan gerrymander when it complies with traditional redistricting criteria.

This rule is consistent with the caselaw on racial gerrymandering. In those cases, "a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests." *Miller* v. *Johnson*, 515 U.S. 900, 916 (1995). Under this "subordination test," "[w]here these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a State can 'defeat a claim that a district has been gerrymandered on racial lines.'" *Id.* (quoting *Shaw*, 509 U.S. at 647); *see also Ala. Legislative Black Caucus* v. *Alabama*, 135 S. Ct. 1257, 1270 (2015) ("[T]he 'plaintiff must prove that the legislature subordinated traditional districting

principles . . . to racial considerations.'" (quoting *Miller*, 515 U.S. at 916 (emphasis omitted)) (*ALBC II*).

The Court has applied the subordination test in the context of racial gerrymandering for reasons that apply to all claims of gerrymandering. First, "[e]lectoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests." *Miller*, 515 U.S. at 915; *see also id.* at 916 (referring to "the sensitive nature of redistricting"). Second, this Court has recognized a "presumption of good faith that must be accorded legislative enactments." *Id.* Third, there is an "evidentiary difficulty" in establishing whether a legislature was motivated by impermissible considerations or was merely aware of them. *Id.*; *see also Shaw*, 509 U.S. at 646 (referring to the "difficulty of proof"). These three factors "requir[e] courts to exercise extraordinary caution," *Miller*, 515 U.S. at 916, in all partisan gerrymandering cases that turn on proof of alleged discriminatory effect. *See also Vieth*, 541 U.S. at 306 (Kennedy, J., concurring in the judgment) (affording "judicial relief" in political gerrymandering cases only "if some *limited and precise* rationale were found to correct an established violation of the Constitution in some redistricting cases." (emphasis added)); *id.* at 307 (noting the risk for the courts of "assuming political, not legal, responsibility for a process that often produces ill will and distrust").

The district court in this case abandoned the restraint counseled by this Court. The majority concluded that "[i]t is entirely possible to conform to legitimate redistricting purposes but still violate the Fourteenth Amendment because the discriminatory

action is an operative factor in choosing the plan." App. 120a. In reaching this conclusion, it relied primarily on inapposite dicta from *Fortson* v. *Dorsey*, 379 U.S. 433 (1965), and *Gaffney* v. *Cummings*, 412 U.S. 735 (1973), which were one-person, one-vote cases. But "an equal population goal . . . is part of the redistricting background," not a traditional redistricting principle. *ALBC II*, 135 S. Ct. at 1270. As a result, these cases do not resolve whether compliance with traditional redistricting principles is sufficient to defeat a claim of political gerrymandering.

If compliance with traditional redistricting criteria is not a floor for political gerrymandering claims, then courts will be propelled deep into the political process. As noted above, passing upon the constitutionality of choices among options that all comply with traditional redistricting criteria will force courts to decide how much partisanship is too much—a subjective political judgment. And a legislature that was impermissibly partisan—however that is defined—when it drew the initial map likely will remain impermissibly partisan when a court orders it to draw a new one. If so, courts will end up drawing more plans themselves and shouldering "the difficulties . . . in drawing a map that is fair and rational." *LULAC*, 548 U.S. at 415. These tasks will further burden the district courts in an area where this Court has already expressed doubts about manageability. *See, e.g.*, *Vieth*, 541 U.S. at 307–08 (Kennedy, J., concurring in the judgment); *see also supra* § I.C.

Redistricting *by a legislature* has always been an unavoidably political process. *Vieth*, 541 U.S. at 274 (plurality opinion); *see also ALBC II*, 135 S. Ct. at

1270 (listing "political affiliation" as a traditional redistricting criterion); *Vieth*, 541 U.S. at 360 (Breyer, J., dissenting) ("[T]raditional or historically based boundaries are not, and should not be, 'politics free.'"); *Shaw*, 509 U.S. at 646 (noting that the legislature "is aware of . . . political persuasion" when it redistricts). And what history has sanctioned, modern thought has ratified. "[D]rawing lines for congressional districts is one of the most significant acts a State can perform to ensure citizen participation in republican self-governance." *LULAC*, 548 U.S. at 416. And "purely political boundary-drawing, even where harmful to the members of one party, will often nonetheless find justification in other desirable democratic ends, such as maintaining relatively stable legislatures in which a minority party retains significant representation." *Vieth*, 541 U.S. at 360 (Breyer, J., dissenting).

Because of the political nature of redistricting and general principles about the limited role of our federal judiciary, the courts cannot plausibly require the legislature to redraw every politically motivated district. "A decision ordering the correction of all election district lines drawn for partisan reasons would commit federal and state courts to an unprecedented intervention in the American political process." *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring in the judgment); *see also Miller*, 515 U.S. at 916 (stating that "courts must . . . recognize . . . the intrusive potential of judicial intervention into the legislative realm" in redistricting cases). The task of the courts—if these claims are even justiciable—is to regulate political gerrymanders in which "legislative restraint was abandoned." *Vieth*, 541 U.S. at 316 (Kennedy, J., concurring in the judgment). Restraint has not been abandoned when traditional redistricting principles are observed.

* * *

As noted above, the Court should put an end to the confusion in the district courts by noting probable jurisdiction and holding that political gerrymandering claims are nonjusticiable. Even if this Court were not satisfied with thirteen years of trial and error on that point, it should at least clarify that a district that complies with traditional redistricting criteria cannot be an unconstitutional partisan gerrymander.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction and hold that assertions of political gerrymandering present a nonjusticiable question.

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